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No. 00-1505

In The

Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,

Petitioner,

v.

PATRICIA HEATON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Patricia Heaton, submits this brief in opposition to the petition for a writ of certiorari filed by Monogram Credit Card Bank of Georgia ("Petitioner" or "Monogram").

The Petition should be denied. The Fifth Circuit's ruling does not present the question raised by Petitioner. Monogram claims the Fifth Circuit refused to review the remand order simply because the trial court invoked 28 U.S.C. §1447(c). Petition at i. This is incorrect. Even a cursory review of the Fifth Circuit's decision reveals that the panel carefully scrutinized the entire remand order. After doing so, the Court of Appeals held that the remand was based on §1447(c) and not on §1367(c)(3) as Monogram had claimed. Thus, the Fifth Circuit did not rely on "magic words" in dismissing the appeal, and the ruling below is not worthy of a grant of certiorari.

The Petition should also be denied because Monogram has waived its right to seek review of the Fifth Circuit's decision. The day after the Court of Appeals issued the ruling Monogram removed the case to federal court for a *second* time. To establish federal question jurisdiction, Monogram relied on the federal claim the Fifth Circuit had reinstated in the decision. Monogram acquiesced in the judgment and did not suggest the ruling was in error or subject to further review.

Only now, after the district court has remanded the case a second time, does Monogram claim the Fifth Circuit erred and the Court should review the decision. Monogram, however, waived its right to seek relief in this Court by adopting the Fifth Circuit's ruling as its own.

Petitioner's conflicting, self-serving arguments are barred by the concept of judicial estoppel and must be rejected.

Monogram's petition, moreover, should be denied as moot. Monogram failed to advise the Court that the Federal Deposit Insurance Corporation ("FDIC") appealed the district court's second remand ruling to the Fifth Circuit. The appeal is pending. Thus, the issue now is whether the district court's second remand ruling was correct. Monogram's petition for a writ of certiorari, which is based on the first remand ruling, is moot.

Ultimately, certiorari should be denied because the Fifth Circuit's decision to dismiss the appeal under 28 U.S.C. §1447(d) is plainly correct. The ruling is consistent with *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and its progeny. The Court of Appeals properly rejected Monogram's transparent attempt to create appellate jurisdiction where none existed.

STATEMENT OF THE CASE

I. THE EVENTS LEADING UP TO THE FIRST REMAND RULING

A.

On May 11, 1998, Ms. Heaton filed this class action in state court on behalf of all Louisiana citizens who (like her) have been overcharged by Monogram in violation of the Louisiana Consumer Credit Law ("LCCL"). Monogram violated the LCCL by exceeding the limits placed on interest and late fees.

Ms. Heaton had entered into a private-label credit card contract with Monogram. Unlike a Visa or MasterCard, Ms. Heaton was provided with a credit card that only allowed her to shop at a local appliances store.

Monogram is not a bank in the ordinary sense of the word. Instead, it is a unique creature of Georgia law, a "credit card bank."

B.

Monogram removed the case to federal court, invoking diversity and federal question jurisdiction. Because Ms. Heaton had only alleged state-law claims, Monogram argued a federal question existed under the complete preemption doctrine. Specifically, Monogram alleged Ms. Heaton's claims were preempted by 12 U.S.C. §1831d(a).

Ms. Heaton moved to remand, arguing that federal question jurisdiction did not exist. The federal preemption statute could only be invoked by a "State bank," which is a bank incorporated under state law and engaged in the business of receiving deposits. *See* 12 U.S.C. §1813(a)(2).

Ms. Heaton argued Monogram was not a "State bank" because it was not engaged in the business of receiving deposits. As a Georgia credit card bank, Monogram could "only" engage in the business of credit cards. O.C.G.A. §7-5-3(6). The FDIC did not consider this issue when the agency approved Monogram for deposit insurance in 1988.

C.

Two days before oral argument on Ms. Heaton's remand motion, Monogram submitted a supplemental

brief. Attached was a letter signed by an FDIC employee and printed on FDIC letterhead (the "Letter"). In the Letter, the FDIC employee declared that Monogram was a "State bank." This, of course, was the core issue in the preemption analysis.

The district court denied the motion to remand, finding that federal question jurisdiction did exist under the complete preemption doctrine because Monogram was a "State bank." Pet. App. at 15a. The district court assumed the Letter was legitimate and substantially deferred to it in reaching this conclusion. *Id.* & n.1.

D.

Because the Letter was submitted at the last minute, Ms. Heaton did not have the opportunity to check its veracity. This was unfortunate because Ms. Heaton later discovered the Letter was Monogram's work product. The Letter had actually been ghost-written by John Douglas, a lawyer hired by Monogram who was the former general counsel of the FDIC.

Ms. Heaton sought to depose the FDIC employee who had signed the Letter. The FDIC, however, refused to make the employee available for deposition.

E.

Before discovering that the Letter was actually Monogram's work product, Ms. Heaton was granted leave to add a federal claim under the federal Truth in Lending Act ("the TILA claim"). At the time she had been duped into believing the Letter was legitimate and that federal question jurisdiction did exist.

F.

Because the Letter did not represent an impartial agency determination, Ms. Heaton moved for reconsideration of her motion to remand.[1] Ms. Heaton reiterated that Monogram could not be a "State bank" because Monogram was *prohibited* from engaging in the business of receiving deposits. O.C.G.A. §7-5-3(6). Moreover, the only deposits received by Monogram were from its parent company, GE, which were used to capitalize Monogram.

To further illustrate Monogram was not a State bank, Ms. Heaton noted that Monogram had less than one percent (.39%) of its money insured by the FDIC. Traditional banks, however, had approximately 76% of their deposits insured. Counsel for Monogram admitted at oral argument that the only reason Monogram obtained the de minimis amount of insurance was to attempt to qualify as a State bank and invoke the preemption statute. Resp. App. at 37.

At oral argument, the district court expressed its view that remand might be appropriate because Monogram may not qualify as a "State bank."

To prevent a remand, Monogram again turned to its friends at the FDIC for help. Thus, shortly after oral argument the FDIC filed a motion to intervene as a party in the case. If granted, the FDIC would argue federal question jurisdiction existed under 12 U.S.C. §1819(b)(2)(A) thereby preventing a remand. Ironically,

---

[1] In her briefs, Ms. Heaton indicated she would dismiss the federal claim and later did so. Monogram incorrectly suggests that Judge Barbier raised this issue sua sponte. Petition at 6.

the FDIC was aware of the case for over a year before seeking to intervene.

II. THE CASE IS REMANDED.

The district court granted reconsideration and remanded the case due to a lack of subject matter jurisdiction. Pet. App. at 20a. The trial court rejected Monogram's claim that Ms. Heaton had waived her jurisdictional objections by adding a federal claim after removal. *Id.* at 21a. Because no waiver had occurred, the district court noted its dismissal of the federal claim in a footnote. *Id.* at n.1.[2]

The trial judge then turned to the issue of federal question jurisdiction. The court found it lacked such jurisdiction because Monogram did not qualify as a "State bank" and, therefore, could not invoke the federal preemption statute. *Id.* at 21a-22a. Similarly, the judge found he lacked diversity jurisdiction. *Id.* at 22a.

The district court, therefore, specifically cited 28 U.S.C. §1447(c) and remanded the case. *Id.* The court recognized that if federal jurisdiction was in doubt, remand was appropriate. *Id.*[3]

III. MONOGRAM APPEALS THE REMAND RULING.

A.

Acutely aware of §1447(d) and its prohibition on appealing remand orders, Monogram knew its appeal

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[2] Ms. Heaton had previously moved to dismiss the claim with prejudice.

[3] Because the court lacked subject matter jurisdiction, the FDIC's motion to intervene was subsequently denied as moot.

had to squeeze into the *Thermtron* exception. As a result, Monogram argued in the Notice of Appeal the district court "erroneously cited" §1447(c) and actually remanded the case in its discretion under 28 U.S.C. §1367(c)(3). Resp. App. at 1-2. Under *Thermtron*, a remand under §1367(c)(3) would have been appealable.

To establish that a §1367(c)(3) remand had occurred, Monogram invoked *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758 (5th Cir. 1994) and argued that the trial court's dismissal of the federal claim proved federal jurisdiction had existed. Therefore, the remand of the remaining state-law claims must have been in the district court's discretion under §1367(c)(3).

Notably, Monogram had *not* asked the district court to reconsider its invocation of §1447(c) before raising the issue on appeal. Similarly, Monogram did not request the trial judge to clarify whether he remanded the case under §1367(c)(3) or §1447(c).

B.

Ms. Heaton moved to dismiss the appeal under §1447(d) for lack of appellate jurisdiction. The district court obviously had not remanded the case under §1367(c)(3). The judge's entire analysis was focused on whether he enjoyed subject matter jurisdiction. *See* Pet. App. at 20a-22a. The district court, moreover, did not cite §1367(c)(3), nor did it rely on any of the factors articulated by this Court in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) in deciding a discretionary remand. Even if the trial court erred in remanding under §1447(c), the order was still unappealable. *See Thermtron*, 423 U.S. at 351.

Monogram responded that the Fifth Circuit should review the remand ruling and determine the statutory basis on which the remand was based. Monogram argued the Court of Appeals did "not need to look beyond the face of the remand order here to determine that, in reality, it is necessarily based on Section 1367(c)(3), and therefore appealable." Monogram's Opposition to Motion to Dismiss at 8.

IV. THE FIFTH CIRCUIT DECISION

A.

On November 2, 2000, the Fifth Circuit dismissed Monogram's appeal under §1447(d). Pet. App. at 1a-12a. The Fifth Circuit did exactly what Monogram requested. The panel thoroughly scrutinized the remand order to determine for itself whether the remand was based on a §1447(c) ground.

The Fifth Circuit found that a "plain and common sense reading of . . . Judge Barbier's remand order reveals that he stated a §1447(c) basis for remand." Pet. App. at 5a. For example, the trial judge expressly held that he did "not have federal question jurisdiction and that there is no federal preemption." *Id.* (quotations omitted) Similarly, the district court had "invoked §1447(c) in ordering the remand." *Id.*

B.

The appellate court did not stop its analysis of the remand ruling at this point. Instead, the Fifth Circuit went on to reject Monogram's invocation of *Bogle* and the argument that the trial court must have exercised jurisdiction in dismissing the federal claim. *Bogle* was distinguishable because that case involved an ambiguous

remand ruling in which the trial court remanded for lack of jurisdiction, but also discussed the *Carnegie-Mellon* factors in deciding a discretionary remand. Pet. App. at 7a.

Here, however, the Fifth Circuit found "no ambiguity whatsoever in Judge Barbier's remand order." *Id.* The trial judge "clearly intended to base his order on §1447(c)." *Id.* at 11a. Moreover, the district court did not cite §1367(c)(3) or the *Carnegie-Mellon* factors. *Id.* at 7a.

As a result, the district court erred in dismissing the federal claim with prejudice because the court found it lacked subject matter jurisdiction. Therefore, the Fifth Circuit reinstated the federal claim, holding that the dismissal order was void and of no effect. *Id.* at 11a-12a.

V. MONOGRAM RELIES ON THE FIFTH CIRCUIT DECISION AND RE-REMOVES THE CASE.

A.

Monogram removed the case to federal court for the second time the morning after the Fifth Circuit rendered its decision. To invoke federal question jurisdiction, Monogram relied on the federal claim that had been revived by the Court of Appeals. Resp. App. at 7 & 9.[4] Nowhere in the Notice of Removal did Monogram claim the Fifth Circuit's decision was in error or subject to further review. *Id.*

Ms. Heaton moved to remand the case for lack of subject matter jurisdiction. Ms. Heaton had dismissed the federal claim in state court the day before Monogram re-removed the case as authorized by Louisiana Code of Civil Procedure article 1671.

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[4] Monogram also removed the case on the same grounds it had alleged in the first removal: namely, complete preemption by 12 U.S.C. 1831d(a) and diversity jurisdiction.

B.

Realizing the district court would remand the case a second time, Monogram again turned to the FDIC for help. The agency, consequently, filed another motion to intervene as a party, hoping to invoke 12 U.S.C. §1819(b)(2)(A) and create federal question jurisdiction. Monogram and the FDIC had tried this tactic in 1999 in connection with the first remand proceedings. *See supra* at 5.

C.

In addition to the FDIC's repeated motions to intervene and the misleading Letter, the agency has attempted to assist Monogram in other ways. For example, the FDIC attempted to assist Monogram in its Fifth Circuit appeal by publishing General Counsel Opinion No. 12 only *five days* before Monogram's brief was due. Ironically, the FDIC admits that this opinion marked the first time, *in 65 years*, that the agency opined on the meaning of the phrase "engaged in the business of receiving deposits."

Monogram extensively relied on the general counsel opinion in its Fifth Circuit brief. This is not the first time the FDIC has attempted to influence ongoing litigation by publishing its opinions. *See, e.g., Irving Indep. School Dist. v. Packard Properties*, 970 F.2d 58 (5th Cir. 1992) (FDIC published legal memorandum and policy statement after the trial court had ruled against it).

D.

The Attorney General for the State of Louisiana filed an amicus brief in the Fifth Circuit on Ms. Heaton's

behalf because he was troubled over Monogram's and the FDIC's behavior.

Various special interest groups filed amicus briefs on Monogram's behalf in the Fifth Circuit. Not surprisingly, these same groups are apparently filing amicus briefs in support of Monogram's petition for a writ of certiorari.

VI. AT THE REMAND HEARING, THE DISTRICT COURT STRONGLY CRITICIZES THE FDIC'S AND MONOGRAM'S BEHAVIOR IN THE CASE.

At the hearing on the remand motion, the district court severely criticized the agency and its persistent efforts to assist Monogram in the case.

> THE COURT: The FDIC has been helping Monogram throughout. That's no secret.
>
> [FDIC]: No, Your Honor, we don't make it a secret.
>
> THE COURT: . . . You have been helping them from the very beginning. You have assisted them; when you assisted them you obstructed the plaintiffs' discovery. You did not want to be involved in private litigation.

Resp. App. at 13.

The Court then admonished the agency that its intervention request was merely designed to create federal jurisdiction in an effort to help Monogram:

> "To me I can only draw one logical conclusion from all of this: This is simply a maneuver to avoid remand of the case, pure and simple. And nothing else makes any sense to me."

Id.

Judge Barbier is not the only federal judge to criticize the FDIC for attempting to manipulate federal jurisdiction by improperly seeking to intervene in a case. In *Hickey v. NCNB Texas National Bank*, 763 F. Supp. 896 (N.D. Tex. 1991), the court struck down the FDIC's intervention and explained: "The only possible explanation for the intervention was to use on behalf of existing defendants – and, in the court's view, to abuse – the power of removal granted to FDIC-Receiver." *Id.* at 897.

Later in the hearing, the trial court reiterated its grave concerns regarding the FDIC's efforts to assist Monogram in the case. The judge stated:

> "I'm very disturbed I will say this about the actions of the FDIC in this entire matter, and I thought the FDIC was there to protect the public frankly and consumers and not to protect Monogram Bank and similar companies. I thought they were to regulate these companies and not to protect them and to the extent of even defending them in private civil litigation."

Resp. App. at 14.

The district court also emphasized he was not the only one concerned about the FDIC's antics:

> I'm not the only one that is disturbed by the FDIC's actions in this. I'm sure you are aware that among others the attorney general for the State of Louisiana and apparently other attorneys general and consumer advocates around the country **are very disturbed and bothered and critical of the FDIC's actions in this type of litigation. And I must say I agree with them.**

Id. at 15 (emphasis added).

VII. THE CASE IS REMANDED A SECOND TIME.

On January 5, 2001, the federal court remanded the case for lack of subject matter jurisdiction and denied the FDIC's intervention as moot. Resp. App. at 17-25. The decision was comprehensive. The district court thoroughly explained why Monogram was not a State bank and rejected General Counsel Opinion No. 12 as unpersuasive. *Id.* at 21-22.

The first remand order and the second remand order present essentially the same jurisdictional issues. In both rulings, the trial court found it lacked federal question jurisdiction because Monogram did not qualify as a "State bank" and, therefore, could not invoke the federal preemption statute. *Compare* Pet. App. at 21a-22a *with* Resp. App. at 22-23. Similarly, in both orders the trial court found it lacked diversity jurisdiction. *Compare* Pet. App. E at 22a *with* Resp. App. 24-25.

VIII. SUBSEQUENT PROCEEDINGS

In its Petition, Monogram failed to advise the Court of the proceedings that have occurred in the case following the second remand. To ensure the Court has a complete record in rendering its decision, Ms. Heaton supplements as follows:

On January 11, 2001, the FDIC filed a notice of appeal, seeking review of the second remand order and the denial of its intervention request. Resp. App. at 26. The appeal is pending.

The FDIC subsequently moved the district court for a stay of the second remand ruling pending the appeal. On February 14, 2001, the district court denied the FDIC's request for a stay. Resp. App. at 27-30.

Thereafter, the agency moved the Fifth Circuit for a stay pending appeal, claiming such relief was necessary in light of the alleged implications the case presented for the banking industry. On March 22, 2001, in a unanimous decision, the Fifth Circuit refused to issue a stay. Resp. App. at 31. The panel, however, carried with the case Ms. Heaton's motion to dismiss the FDIC's appeal. Resp. App. at 32.

Adding to the procedural complexity is that the FDIC is currently seeking to intervene as a party for the third time, now in State court. Resp. App. at 33 (cover page of motion). The FDIC admits that if the motion is granted, the case will be removed to federal court for a *third* time. Again, the present petition for a writ of certiorari would be moot.

REASONS FOR DENYING THE WRIT

The case is not appropriate for Supreme Court review for the reasons discussed below.

I. THE CASE DOES NOT PRESENT THE QUESTION POSED IN THE PETITION.

The Petition should be denied because the Fifth Circuit decision does not present the question raised by Petitioner. Monogram claims the Court of Appeals refused to review the remand ruling simply because the trial court invoked §1447(c). *See* Petition at i. As a result, the Fifth Circuit "had to ignore" the face of the remand order. Petition at 2.

Monogram's arguments defy common sense and are easily rebutted by a review of the Fifth Circuit's ruling.

The panel carefully scrutinized the remand order and dismissed Monogram's appeal only after concluding the remand was clearly and unambiguously based on §1447(c).

In its analysis, the Fifth Circuit painstakingly reviewed the language of the remand order. The Court of Appeals noted that the district court had specifically found it lacked federal question jurisdiction and that federal preemption did not exist. Pet. App. at 5a. The district court, moreover, specifically invoked §1447(c) in ordering the remand, and stated remand should be granted if federal jurisdiction is in doubt. *Id.*

Further confirming its conclusion that the trial court had remanded under §1447(c), the Court of Appeals recognized that "nowhere in the order did the judge discuss the discretionary factors set forth in *Carnegie-Mellon*, nor did he cite §1367(c)(3) *or any other basis for remand.*" *Id.* at 7a (emphasis added).

After completing its careful review of the district court ruling, the Fifth Circuit saw "no ambiguity whatsoever in Judge Barbier's remand order." *Id.* at 7a. A "plain and common sense reading of . . . Judge Barbier's remand order reveals that he stated a §1447(c) basis for remand." *Id.* at 5a. The district court's "citation of §1447(c) is clearly not a 'mislabeling' of the basis for remand." *Id.* The Court of Appeals concluded: "We think Judge Barbier clearly intended to base his order on §1447(c)." *Id.* at 11a.

In addition, the Fifth Circuit rejected Monogram's invocation of *Bogle* and the argument that the trial court must have exercised jurisdiction in dismissing the federal claim. Instead, it was error for the trial court to dismiss the federal claim because the court had concluded it

lacked jurisdiction. The panel, consequently, reinstated the federal claim. Pet. App. at 11a-12a. Monogram's attempt to convert the district court's error into an argument for a §1367(c)(3) remand is unavailing. *See* Petition at 19-20.

The Fifth Circuit used the phrase "magic words" only once in the opinion when it quoted from the *Bogle* case. Pet. App. at 8a. The Court of Appeals did not suggest it was dismissing Monogram's appeal simply because the trial court had invoked §1447(c). The panel satisfied itself, as Monogram had requested, that the remand was pursuant to §1447(c) and not §1367(c)(3).

Monogram's attempt to portray the Fifth Circuit as a rogue circuit that mechanically dismisses remand orders based on "magic words" is inaccurate. The Petition should be denied because the case does not present the question posed by Monogram.

II. THE PETITION SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT'S DECISION IS PLAINLY CORRECT.

There is little doubt the Fifth Circuit's decision to dismiss the appeal under §1447(d) is consistent with the Court's jurisprudence. The Supreme Court has made abundantly clear that §1447(d) "prohibits review of all remand orders issued pursuant to §1447(c) whether erroneous or not." *Thermtron*, 423 U.S. at 343.

Here, the Fifth Circuit found after reviewing the order that the district court's remand "was based *solely* on §1447(c) grounds". Pet. App. at 9a, n.3 (emphasis added). Thus, following *Thermtron*, the Court of Appeals held "even if Judge Barbier's conclusion that he lacked subject matter jurisdiction was clearly erroneous, he did

not state a non-§1447(c) ground for remand and we cannot review his order." *Id.* at 8a. The Fifth Circuit denied rehearing en banc on this procedural ruling. Pet. App. at 24a-25a.

The cases cited by Monogram did not involve remand orders like the one here. The cases dealt with remand orders that either did not contain reasons for the remand, or were facially ambiguous on why the remand had been granted. *See e.g., Mangold v. Analytic Serv., Inc.*, 77 F.3d 1442 (4th Cir. 1996) (remand order cites §1447(c) and discusses factors relating to discretionary remand); *Transit Casualty Co. v. Certain Underwriters at Lloyd's*, 119 F.3d 619, 624 (8th Cir. 1997) ("district court's citation to §1447(c) was somewhat ambiguous"); *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1350 (11th Cir. 1998) (district court did not state the statutory basis for its remand order); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (court did not explain why case was remanded); *Zuniga v. Blue Cross & Blue Shield*, 52 F.2d 1395, 1400 (6th Cir. 1995) (district court did not specify reasons for remanding counts).

III. THE PETITION SHOULD BE DENIED BECAUSE MONOGRAM HAS WAIVED ITS RIGHT TO SEEK REVIEW OF THE FIFTH CIRCUIT DECISION.

Monogram has waived the right to seek review of the Fifth Circuit ruling in this Court. Monogram embraced the decision as correct when Monogram relied on it to establish federal question jurisdiction and re-remove the case. *See* Resp. App. at 7 & 9. Monogram attached the Fifth Circuit's decision as an exhibit to the Notice of Removal and did not claim the ruling was in error or subject to further review. *Id.*

Only now, after the district court remanded the case for a second time, does Monogram reverse course and argue the Fifth Circuit's decision was in error. Having adopted the ruling, Monogram cannot disown it. Monogram has waived its right to seek review of the decision and is judicially estopped from taking such inconsistent positions. *See Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir.), *cert. denied*, 121 S. Ct. 59 (2000) (Judicial estoppel "is a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position."); *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000) (doctrine "is to protect the integrity of the judicial process by preventing the parties *from playing fast and loose* with the courts to suit the exigencies of self interest") (quotations and alterations omitted) (emphasis added).

IV. THE PETITION SHOULD BE DENIED AS MOOT.

By removing the case a second time, Monogram mooted the first remand ruling and this certiorari petition. The question now is whether the second remand ruling was proper. This is the subject of a pending Fifth Circuit appeal. If the Court of Appeals reverses the second remand order, the case may be back in federal court.

Similarly, the FDIC has sought to intervene in state court. Resp. App. at 33-34. If granted, the FDIC and Monogram have indicated the case will be removed to federal court for a *third* time. Such a removal would spawn additional jurisdictional litigation, and again moot the first remand ruling. Thus, any decision rendered by the Court relating to the first remand ruling is simply advisory in nature.

Alternatively, the Court may wish to remand the matter to the Fifth Circuit to determine whether the now-superceded first remand ruling remains a live controversy. *See Scott v. Kentucky Parole Board*, 429 U.S. 60, 61 (1976) ("The Court postpones decision of the issue by sending the case back to the Court of Appeals for its advice on the question whether the litigation is now moot.") Such action may be appropriate in light of the pending FDIC appeal on the second remand ruling.

V. THE PETITION SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT'S DECISION FURTHERS PUBLIC POLICY.

The Fifth Circuit's decision in this case furthers public policy and should not be disturbed. Permitting a party, like Monogram, to re-write the clear and unambiguous basis for a remand ruling would clearly lead to undesirable results. Future litigants who want to circumvent §1447(d) will simply claim to have discovered the "real" reason for the trial court's remand. The appellate floodgates will open and consistency will be lost.

Congress enacted §1447(d) to avoid protracted jurisdictional litigation. *Thermtron*, 423 U.S. at 351. Monogram's request that the lower court's decision be re-written to permit an appeal directly contravenes this congressional goal.

Moreover, this particular case begs for the application of §1447(d). The jurisdictional wrangling has gone on for more than three years, and it is time to reach the merits of the case. The State Court is certainly capable of resolving the federal issues presented in the case, and the remand rulings do not carry any preclusive effects. Pet. App. at 11a.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 18, 2001

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICIA HEATON, on behalf of herself and all others similarly situated,	**CIVIL ACTION NO. 98-1823 c/w No. 99-2603**
Plaintiff,	**SECTION "J"**
v.	
MONOGRAM CREDIT CARD BANK OF GEORGIA,	**MAGISTRATE 1**
Defendant.	(Filed Dec. 3, 1999)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendant Monogram Credit Card Bank of Georgia ("Monogram") hereby appeals to the United States Court of Appeals from the November 22, 1999 order by the District Court, which remanded plaintiff's breach of contract and Louisiana Consumer Credit Law ("LCCL") claims to state court.

The District Court dismissed with prejudice a federal claim that had been brought by plaintiff under the Truth in Lending Act ("TILA"), 15 U.S.C. §1601, *et seq.*, as the predicate to its order remanding the remaining claims to state court. Federal subject matter jurisdiction indisputably existed by reason of plaintiff's assertion of the TILA claim, and federal jurisdiction was clearly exercised when the District Court granted plaintiff's motion for voluntary

dismissal of the TILA claim with prejudice. Therefore, the remand of the remaining claims immediately following the Court's dismissal with prejudice of the TILA claim was necessarily made under 28 U.S.C. §1367(c)(3), not 28 U.S.C. §1447(c). As the Fifth Circuit stated in *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994):

> The critical distinction for determining appealability is the presence of federal subject matter jurisdiction prior to the order of remand. In a Section 1447(c) remand, federal jurisdiction *never* existed, and in a non-Section 1447(c) remand, federal jurisdiction *did exist* at some point in the litigation, but the federal claims were either settled or dismissed. (emphasis in original).

See Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1350-1351 and n. 3 (11th Cir. 1998) (plaintiff amended complaint after removal to add ERISA claim; court later dismissed ERISA claim and remanded remaining claims; remand order was therefore necessarily made under Section 1367(c)(3), not Section 1447(c), and was appealable).

Where a federal claim is dismissed and thereafter the remaining claims are remanded to state court, the remand is made pursuant to the discretionary authority of 28 U.S.C. §1367(c)(3) and is appealable as a matter of right under 28 U.S.C. §1291. *See, e.g., Guzzino v. Felterman*, 191 F.3d 588, 594 and n. 7 (5th Cir.1999); *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994). The mere fact that the District Court erroneously cited 28 U.S.C. §1447(c), rather than 28 U.S.C. §1367(c)(3), as the basis for its remand following the dismissal with prejudice of the TILA claim does not render the remand order non-

reviewable. *Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1450-1451 (4th Cir. 1996).

PROCEDURAL BACKGROUND

The remand order by Judge Barbier was entered on a "Motion for Reconsideration" filed by plaintiff more than one year after the prior denial of her remand motion by Judge Porteous, the judge originally assigned to this case. Judge Porteous denied remand on October 7, 1998, specifically concluding that Monogram is a "state bank" under Section 3(a)(2) of the Federal Deposit Insurance Act, 12 U.S.C. §1813(a)(2), and therefore plaintiff's LCCL claim was completely preempted by Section 27 of that Act, 12 U.S.C. § 1831d. Directly contrary to Judge Porteous' ruling, Judge Barbier concluded in his November 22, 1999 remand order that Monogram is *not* a "state bank." Both Judge Porteous and Judge Barbier stated that their rulings were supported by the "plain language" of the Federal Deposit Insurance Act, but they reached diametrically opposed positions on the meaning of that "plain language." Judge Barbier did not even mention the prior contrary decision by Judge Porteous, nor did he offer any explanation for reversing Judge Porteous' ruling, which was the law of the case. *See Loumar v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) ("when a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision"). Judge Barbier's remand order was not only contrary to the denial of remand by Judge Porteous, it was also contrary to Judge Barbier's own decision a year earlier, on November 25,

1998, wherein he denied plaintiff's motion for interlocutory appeal of Judge Porteous' denial of remand and stated that "plaintiff has not shown a substantial ground for difference of opinion as to whether defendant is a state bank. Plaintiff cites no authority for the contention that defendant is not a state bank."

In addition, Judge Barbier issued his remand order within one business day of being advised in writing of the Federal Deposit Insurance Corporation's ("FDIC") intent to intervene immediately in this case. As Monogram advised the District Court prior to its remand order, FDIC intervention would have created an independent basis for federal jurisdiction. *See* 12 U.S.C. §1819(b). The FDIC's brief in support of intervention states: "For the FDIC, the impact of a decision by the Court in this area extends beyond the fate of Monogram and may affect hundreds of similarly situated FDIC-insured institutions processing billions of dollars in transactions. A decision adverse to Monogram may literally open the floodgates of litigation and deluge the institutions regulated by the FDIC with a torrent of similarly frivolous suits." The FDIC's motion to intervene was filed before the remand order was entered, but was not acted on by Judge Barbier prior to the remand.

Respectfully submitted,

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Attorneys for Defendant Monogram Credit Card Bank of Georgia

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICIA HEATON, Individually and on behalf of herself and all others similarly situated,	**CIVIL ACTION NO. 00-3260**
Plaintiff,	**SECTION "I"**
v.	**MAGISTRATE 5**
MONOGRAM CREDIT CARD BANK OF GEORGIA,	
Defendant.	

NOTICE OF REMOVAL

Defendant Monogram Credit Card Bank of Georgia ("Monogram"), while fully reserving its rights to object to any matters, including without limitation, service, jurisdiction, and venue, and without waiving any other defenses or objections to the plaintiff's allegations, has removed to this Court the case captioned, *Patricia Heaton, Individually and on Behalf of Herself and All Others Similarly Situated, v. Monogram Credit Card Bank of Georgia*, No. 98-8275, Div. D, originally filed in the Judicial District Court for the Parish of Orleans, State of Louisiana, by plaintiff Patricia Heaton.

1.

This Court's removal jurisdiction is based on federal question jurisdiction as provided in 28 U.S.C. §§ 1331 and 28 U.S.C. §§ 1441(a) and (b).

2.

Plaintiff has alleged a violation of the Federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et. seq., which constitutes a claim arising under the laws of the United States. The United States Fifth Circuit Court of Appeals voided the district court's order dismissing the TILA claim and further noted that Monogram could again remove the matter to federal court based on the reinstatement of the TILA claim. *See* November 2, 2000 Opinion attached as Exhibit 1.

3.

In addition, plaintiff's allegations that Monogram's charges violate Louisiana law are completely preempted by Section 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. § 1831(d)(a), which also constitutes a claim arising under the laws of the United States.

4.

Diversity jurisdiction exists under 28 U.S.C. § 1332 as the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and is between citizens of different states.

5.

At all relevant times hereto, plaintiff is and has been a citizen of Louisiana and Monogram is and has been a federally-insured state bank located in Georgia.

6.

Plaintiff brings this action not only on her own behalf, but also as a class action pursuant to article 591 of the Louisiana Code of Civil Procedure.

7.

Plaintiff has asked for an award of "reasonable attorney's fees."

8.

The Fifth Circuit has held in *In Re Abbot Laboratories*, 51 F.3d 524 (5th Cir. 1995) that, pursuant to La. Code Civ. Proc. art 595, the entire amount of attorney's fees are attributable to the class representatives.

9.

Clearly, given the size of the putative class and the nature of the claims asserted, the potential counsel fee is in excess of $75,000.

10.

This Court has supplemental jurisdiction over all other claims asserted by plaintiff in accordance with 28 U.S.C. §§ 1367(a) and 1441(c).

11.

Removal is timely under 28 U.S.C. § 1446(b) as less than thirty days have passed since the United States Fifth Circuit Court of Appeals November 2, 2000 decision voided the order entered in the federal court proceedings which dismissed the federal TILA claims alleged by the plaintiff. As a result, the TILA claims are reinstated in these proceedings, thereby creating a basis for removal to federal court.

12.

A Copy of this Notice of Removal has been sent to counsel of record for the plaintiff and has been filed with the Clerk of Court for the Parish of Orleans, State of Louisiana.

13.

Attached to this Notice of Removal as Exhibit 2 are copies of all process, pleadings and orders filed in the state court record through this date.

Respectfully submitted, this 3rd day of November, 2000.

Respectfully submitted,

/s/ Lauren Z. Garvey
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ATTORNEYS FOR MONOGRAM CREDIT CARD BANK OF GEORGIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICIA HEATON,	CIVIL ACTION
Plaintiff	NO. 98-1823 – "J"
v.	New Orleans, Louisiana
MONOGRAM CREDIT CARD, ET AL.	Wednesday, December 20, 2000
	10:00 a.m.
Defendants.	

ORAL ARGUMENT ON SEVERAL MOTIONS
BEFORE THE HONORABLE CARL J. BARBIER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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and

* * *

[31] THE COURT: You have been helping them from the very beginning in this case.

MR. TAYLOR: That's not something to apologize for.

THE COURT: I'm not suggesting you ought to apologize. I'm just trying to get the facts out. You have been helping them from the very beginning. You have assisted them; when you assisted them, you obstructed the plaintiffs' discovery. You did not want to be involved in private litigation. Now all of a sudden this is this great interest of the FDIC. To me I can only draw one logical conclusion from all of this: This is simply a maneuver to avoid remand of the case, pure and simple. And nothing else makes any sense to me. If that is the only reason the FDIC wants to intervene, I don't think you have a basis for intervening.

MR. TAYLOR: No, Your Honor.

THE COURT: I'm not going to allow it.

MR. TAYLOR: No, Your Honor, that is not our sole basis for intervening. As we stated in our papers, what we seek to do is defend our decision in 1988 to insure Monogram Bank and our determination that it was, in fact, a state bank under the FDI Act.

Two, we are here to reserve territory on this issue within the industry. Since 1991 we have –

THE COURT: Monogram has the same interests on both of those points as you do, don't they?

MR. TAYLOR: They may be aligned at this point, yes.

THE COURT: Okay. Why then isn't your interest [32] protected?

MR. TAYLOR: Well, Your Honor, there is a difference between participating in a case as a *amicus* versus as a party. As a party we have a right to appeal. We have a right to brief issues. We have a right to take discovery and present evidence. As a matter of fact, those –

THE COURT: Exactly what you said you didn't have the resources to do a year ago. Now you want to do all of that.

MR. TAYLOR: That was –

THE COURT: You aren't going to depose that guy who gave that affidavit for a deposition if I let you intervene?

MR. TAYLOR: We just think that is frivolous and it is a red herring. The entire thing is a red herring.

THE COURT: I'm not sure about that. If I kept this case, I would be very interested in learning exactly what went on and why. It is very curious to me that a federal agency – I'm very disturbed I will say this about the actions of the FDIC in this entire matter, and I thought the FDIC was there to protect the public frankly and consumers and not to protect Monogram Bank and similar companies. I thought they were to regulate these companies and not to protect them and to the extent of even defending them in private litigation. I just don't understand the FDIC's whole position in this case. I mean what difference does it make if you have to go back to a

MD if ultimately these banks have to go to Congress to get the law changed which they have a perfect right to [33] do? What difference does it make if you have to regulate these state banks? Don't you have another bank to regulate?

MR. TAYLOR: You put you [sic] finger on the point when you said that the FDIC should be regulating these institutions. Our ability –

THE COURT: I said they regulate what they have to regulate and protect consumers, and I don't view your mission as being to protect the industry. And that seems to be what you, what the FDIC considers its mission to be.

I'm not the only one that is disturbed by the FDIC's actions in this. I'm sure you are aware that among others the attorney general of the State of Louisiana and apparently other attorneys general and consumer advocates around the country are very disturbed and bothered and critical of the FDIC's actions in this type of litigation. And I must say I agree with them. I apologize for interrupting you on this, but I wanted to do so at the very beginning.

Let met put on the record that I received several letters in connection with this matter dated December 5, 2000, from the State of Louisiana, Office of Financial Institutions, from a Mr. Gary L. Newport, Chief Attorney. Is Mr. Newport in Court?

(No response.)

THE COURT: He is not here. I don't know Mr. Newport. He is an attorney so I assume he is licensed in

Louisiana since he represents the Office of Financial Institutions for the State of

* * *

United States District Court, E.D. Louisiana.

Patricia HEATON, on Behalf of Herself and All Others Similarly Situated

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

No. Civ.A. 98-1823.

Jan. 5, 2001.

ORDER AND REASONS

BARBIER, J.

Before the Court are Plaintiffs' Motion to Remand (Rec.Doc. 108), Defendant's Motion to Add the Federal Deposit Insurance Corporation ("FDIC") as a Necessary Party Defendant (Rec.Doc. 110), and FDIC's Motion for Leave to Intervene as a Party Defendant (Rec.Doc. 103). The motions were set for hearing with oral argument on December 20, 2000, at which time the Court took the matter under advisement. After considering the memoranda and argument presented by counsel, the Court concludes that it is without subject matter jurisdiction to hear this case. Accordingly, Plaintiffs' motion to remand this case to the Civil District Court for the Parish of Orleans is GRANTED. The remaining two motions are DISMISSED AS MOOT.

Background

In 1998, Patricia Heaton filed a class action suit against defendant Monogram Credit Card Bank of Georgia ("Monogram") in state court alleging that Monogram had violated the Louisiana Consumer Credit Law

("LCCL") by charging excessive credit card late fees and interest. Monogram removed the case to this Court and Plaintiffs' subsequent motion to remand was denied. Resigned to pursuing their case in federal court, Plaintiffs then, over Monogram's objection, amended their complaint to add a federal Truth in Lending Act ("TILA") claim. However, as the case progressed in this Court, Plaintiffs discovered information which prompted them to reurge their motion to remand. On November 22, 1999, this Court determined that it was without subject matter jurisdiction and remanded the case to state court. At the same time, the Court permitted Plaintiffs to dismiss their federal TILA claim.

Rather than proceed in state court, Monogram sought to appeal the remand order to the Fifth Circuit Court of Appeals. On November 2, 2000, the Fifth Circuit dismissed Monogram's appeal concluding that 28 U.S.C. § 1447(d) precluded appellate review. *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 995 (5th Cir.2000). However, the Fifth Circuit reinstated the TILA claim noting that Monogram would have immediate grounds to once again remove the case to federal court – this time based on federal question jurisdiction due to the pending TILA claim. *Id.* at 1000 n. 6. Shortly after the Fifth Circuit issued its ruling, however, Plaintiffs amended their state court petition to delete the federal TILA claim. Monogram then, for the second time, removed the case to this Court. Soon thereafter, FDIC moved to intervene in the suit, Monogram sought to add FDIC as a necessary party, and Plaintiffs once again moved to remand the case to state court.

Discussion

The Court begins its analysis with Plaintiffs' motion to remand. The arguments made by both sides are essentially the same as those made over a year ago when Plaintiffs last moved to remand this case. Monogram argues that it qualifies as a "State bank" under the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. § 1811, *et seq.*) and that section 1831d(a) of the FDIA preempts state law causes of action against State banks. Moreover, Monogram argues that the preemption created by section 1831d(a) is complete so as to allow removal of this case to federal court. Monogram also asserts that the possibility of attorney's fees as part of Plaintiffs' potential award meets the jurisdictional amount for diversity jurisdiction. Plaintiffs, on the other hand, argue that the Court is without subject matter jurisdiction because Monogram is not a State bank, and even if it is, section 1831d(a) does not completely preempt state law claims so as to allow removal to a federal court.

The Court considered the State bank issue over a year ago when the case was remanded the first time. At that time, the Court determined that Monogram, a "credit card" bank chartered under Georgia law, was *not* a State bank within the meaning of the FDIA. *Heaton v. Monogram*, 1999 WL 1789422, at *1 (E.D.La. Nov. 22, 1999). In reaching that conclusion, the Court relied on the plain language of 12 U.S.C. § 1813(a)(2) which defines a State bank as "any bank . . . engaged in the business of receiving deposits . . . and incorporated under the laws of any State. . . . " Although Monogram received deposits from its parent company, it was not "engaged in the business" of receiving deposits from its customers. Accordingly, the

Court concluded that Monogram was not a State bank, and therefore, federal preemption did not apply. *Heaton*, 1999 WL 1789422, at *1.

In opposition to the current motion to remand, Monogram urges the Court to reconsider its prior conclusion on the State bank issue. In support of its position, Monogram directs the Court's attention to several factors that the Court did not have the benefit of considering last time.[1] First, FDIC has since issued General Counsel's Opinion No. 12 ("GCO-12"), in which FDIC sets forth its interpretation of "engaged in the business of receiving deposits." Monogram's Exh. F. According to GCO-12, the statutory requirement of being "engaged in the business of receiving deposits" is satisfied by the continuous maintenance of one or more non-trust deposits in the aggregate amount of $500,000. *Id.* at 1 (65 Fed.Reg. 14568). Second, Monogram points out that it does in fact receive "deposits" from its customers because Monogram accumulates credit balances from customers who overpay their credit card accounts. Finally, Monogram points out that pursuant to recent changes in Georgia law, it now accepts deposits from unaffiliated parties. Monogram's Exh. H, ¶ 2-3.

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[1] In its memorandum and at oral argument, Monogram also argued of the potential chaos that would ensue if courts began to "second-guess" FDIC's determination of State bank status. Implicit in FDIC's 1988 decision to insure Monogram was a finding by FDIC that Monogram was a State bank. While Monogram and FDIC made persuasive arguments on this point, those policy arguments are best left for Congress to resolve rather than the judiciary.

It is important to note that the issue is not whether Monogram "receives deposits" – it likely does. But section 1813(a)(2) does not define a State bank as one that "receives deposits." Rather, a State bank is one *engaged in the business* of receiving deposits. 12 U.S.C. § 1813(a)(2). While the statute does not define "engaged in the business," the Court must assume that Congress added the phrase for some purpose, and therefore, must interpret section 1813(a)(2) so as to give meaning to the phrase. Thus, even assuming that overpayments by credit card customers would qualify as "deposits" under 12 U.S.C. § 1813(1), a premise that in and of itself is not completely clear, it does not necessarily follow that Monogram is engaged in the business of receiving deposits as that term is used in the statute.

Similarly, the fact that the Georgia statutes under which Monogram is chartered now allow Monogram to accept deposits from non-affiliates does not necessarily lead to the conclusion that Monogram is engaged in the business of receiving deposits. Even with the changes in Georgia's banking law, Monogram's ability to accept deposits is still extremely limited. *See* Ga. Stat. § 7-5-3(7). And the law under which Monogram is chartered still dictates that Monogram may only engage in the business of soliciting, processing, and making loans pursuant to credit card accounts. . . . " Ga. Stat. § 7-5-3(6).[2] Thus, the *per se* restrictions imposed by the state law governing

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[2] Furthermore, the statutory changes at issue were made well after Plaintiffs' cause of action arose and this suit was filed. Accordingly, the changes in Georgia law would likely be inapplicable to this lawsuit.

Monogram's operations militate against finding that Monogram engages in the business of receiving deposits.

Finally, GCO-12 does not convince the Court that Monogram engages in the business of receiving deposits. Undoubtedly, Monogram's activities qualify as "engaged in the business of receiving deposits" as FDIC interprets the phrase in GCO-12, and if the Court were bound by GCO-12 it would be compelled to find that Monogram is a State bank. But given that GCO-12 is an opinion letter, it is not entitled to *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 1662-63, 146 L.Ed.2d 621 (2000). Rather, it is "entitled to respect" but only to the extent that the opinions and interpretations expressed therein have the power to persuade. *Id.* Reviewing GCO-12 in light of section 1813(a)(2) it would seem that FDIC's interpretation of "engaged in the business of receiving deposits" ignores at least one aspect of the statute. Section 1813(a)(2) refers to *deposits* in the plural which would seem to indicate that Congress envisioned a State bank to have at minimum more than one deposit. FDIC, on the other hand, seems to completely ignore this and under its interpretation, a *single* deposit of $500,000 suffices. At oral argument, counsel was unable to explain the significance of the $500,000 figure chosen by FDIC. Simply said, the Court is unable to discern how FDIC's interpretation of "engaged in the business of receiving deposits," as explained in GCO-12, gives effect to the language of the statute as Congress wrote it. Accordingly, the Court does not find GCO-12 persuasive.

Thus, having considered Monogram's new arguments, the Court once again concludes that Monogram is

not "engaged in the business of receiving deposits." Consequently, it does not meet the definition of a State bank under the FDIA. Given that Monogram is not a State bank, preemption, whether ordinary or complete, does not apply.[3]

However, assuming *arguendo* that Monogram is a State bank, the Court would nevertheless find removal improper because the Court is convinced that section 1831d does not completely preempt state law causes of action. While neither the Fifth Circuit nor the United States Supreme Court has addressed whether 12 U.S.C. § 1831d(a), the preemption provision of the FDIA, completely preempts state law causes of action, the Fifth Circuit has recognized that the doctrine of complete preemption is to be narrowly applied, that few federal statutes meet the standards necessary to show complete preemption, and that the doctrine should be applied with "circumscription." *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 500 (5th Cir.1999). Further, the Fifth Circuit requires evidence of clear Congressional intent to show that claims preempted by state law are removable. *Id.; Aaron v. National Union Fire Ins.*, 876 F.2d 1157, 1165 (5th Cir.1989). Monogram points to nothing in the FDIA or its legislative history that evidences such intent. And while other courts have reached a contrary

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[3] The Court's determination on this issue will have no preclusive effect in state court because a remand order is jurisdictional in nature. *Heaton*, 231 F.3d at 1000 (citing *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir.1999)). Thus, all of the same defenses and arguments made to this Court, including ordinary preemption, are available to Monogram in state court.

conclusion, *see, e.g., M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608 (8th Cir.1991) (holding that the National Bank Act completely preempts state law claims for usurious interest), the Court finds the reasoning employed in cases such as *Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350 (S.D.Ala. Oct. 2, 2000) (holding that there is no complete preemption under the NBA), more persuasive. The district judge in *Jones* conducted a detailed and comprehensive analysis of complete preemption under sections 85 and 86 of the National Bank Act, the sister statutes to section 1831d, and found absent the requisite congressional intent to allow removal under the complete preemption doctrine. The Court is persuaded that the reasoning employed in *Jones* is consistent with the standards enunciated by the Fifth Circuit in *Heimann* and *Aaron*.

Finally, the Court concludes that there is no diversity jurisdiction because Monogram has failed to demonstrate that Plaintiffs' claims meet the jurisdictional amount. Monogram argues that if Plaintiffs avail themselves of the attorney fee provisions of the LCCL then Heaton, as the sole named plaintiff, will have a claim exceeding $75,000. *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir.1995). However, Plaintiffs amended their state court petition prior to removal to clarify that they are not seeking attorney's fees under the LCCL. Plaintiffs' Exh. 25, at 4, ¶ 10. Plaintiffs' counsel also stipulated on the record at oral argument that Plaintiffs are not claiming and will not attempt to claim attorney's fees under the LCCL. This Court has previously held that attorney's fees are attributed to the class representative only when awarded pursuant to a specific statute. *Jones v. Valvoline Co.*, 1999 WL

319215 (E.D.La. May 20, 1999). Given then that Plaintiffs do not seek attorney's fees pursuant to a statute, an attorney's fee award is not relevant to a claim of diversity jurisdiction in this case. Monogram has not otherwise shown that Heaton's claims meet the jurisdictional amount. Accordingly, the Court finds that it does not have diversity jurisdiction over this suit.

In conclusion, the Court finds that Monogram is not a State bank, and even if it is, Plaintiffs' claims are not completely preempted by federal law. The Court does not have diversity jurisdiction. Consequently, this Court is without subject matter jurisdiction to hear this case. The suit is remanded to state court pursuant to 28 U .S.C. § 1447(c). Given the Court's decision to remand the case, FDIC's motion to intervene and Monogram's motion to add FDIC are moot. Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Remand should be and is hereby GRANTED. The case is remanded to the Civil District Court for the Parish of Orleans. The request for attorney's fees and costs is DENIED;

IT IS FURTHER ORDERED that Defendant's Motion to Add the Federal Deposit Insurance Corporation as a Necessary Party Defendant is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that FDIC's Motion for Leave to Intervene as a Party Defendant is DISMISSED AS MOOT.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Patricia Heaton, Plaintiff, v. Monogram Credit Card Bank of Georgia, et al., Defendants.	)	Case No. 98-1823 Section J Magistrate 1

NOTICE OF APPEAL

Notice is hereby given that the Federal Deposit Insurance Corporation ("FDIC") hereby appeals to the United States Court of Appeals for the Fifth Circuit from the District Court's Order of January 5, 2001 insofar as it dismisses as moot the FDIC's Motion for Leave to Intervene as a Party Defendant and grants the Plaintiffs' Motion to Remand.

Respectfully submitted,

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United States District Court, E.D. Louisiana.

Patricia HEATON, on Behalf of Herself and All Others Similarly Situated

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

No. Civ.A. 98-1823.

Feb. 14, 2001.

BARBIER, J.

Before the Court is a motion for stay filed by the Federal Deposit Insurance Corporation ("FDIC") (Rec.Doc. 136). Plaintiffs oppose the motion. The motion, set for hearing on February 14, 2001, is before the Court on briefs, without oral argument.

The convoluted procedural background of this case is fully explained in the Court's January 5, 2001 Order and Reasons (Rec.Doc. 133). In that order, the Court explained why it was without subject matter jurisdiction to hear Plaintiffs' suit against Monogram Credit Card Bank of Georgia ("Monogram"). The Court remanded the case to state court pursuant to 28 U.S.C. § 1447(c). At the same time, the Court dismissed as moot FDIC's motion to intervene in the suit, as well as defendant Monogram's motion to add FDIC as a necessary party. FDIC is appealing those rulings and now asks the Court to stay the remand order pending the outcome of its appeal.

In support of its motion for a stay, FDIC argues that this case satisfies the Fifth Circuit's criteria for a stay pending appeal because, among other things, FDIC has a substantial likelihood of success on the merits. As the Court sees it, however, the crucial threshold question is

whether the Court would have jurisdiction to grant FDIC's request should it find FDIC's arguments meritorious. After reviewing the applicable law and the authorities cited by FDIC,[1] the Court concludes that it lacks jurisdiction to issue a stay.

Where an appellate court has jurisdiction to review a remand order, the district court retains jurisdiction to modify or vacate the order. *In re Shell Oil Co.*, 932 F.2d 1523 (5th Cir.1991) (quoting *Browning v. Navarro*, 743 F.2d 1069 (5th Cir.1984)). Appellate courts have no jurisdiction to review an order remanding a case to state court when the federal district court determines that it lacks subject matter jurisdiction. 28 U.S.C. § 1447(d); *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir.2000). Accordingly, it is well-settled that federal courts are completely divested of jurisdiction following a remand to state court based upon a finding that the court lacks subject matter jurisdiction. *New Orleans Pub. Serv. v. Majoue*, 802 F.2d 166, 167 (5th Cir.1986).

FDIC cites 12 U.S.C. § 1819(b)(2)(c) and a host of cases for the proposition that FDIC can appeal any order of remand issued by a district court. And given that FDIC can appeal any order of remand, it follows that this Court retains jurisdiction to issue a stay.

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[1] FDIC did not brief the issue of jurisdiction. Defendant Monogram, without leave of court, filed a memorandum in support of FDIC's motion for a stay. Monogram addressed jurisdiction in its memorandum. To simplify matters, the Court will refer to Monogram's arguments on the jurisdictional issue as if they had in fact been presented by FDIC.

While FDIC's cited authorities unarguably establish that FDIC can appeal an otherwise unreviewable remand order, those authorities do nothing to bolster FDIC's contention that it can appeal the remand order issued in *this* case – a case where FDIC was never a party to the suit. For the same reason, FDIC's reliance on section 1819(b)(2)(c) rings hollow. The Court is persuaded that the remand order in this case is not reviewable at FDIC's request.[2]

Nor is the Court persuaded that the Court's dismissal of FDIC's motion to intervene as moot is appealable. *Afram Carriers, Inc. V. Moeykens,* 145 F.3d 298, 300 (5th Cir.1998), cited by FDIC, recognizes that the denial of an intervention as of right is an appealable final order under 28 U.S.C. § 1291. In this case, the Court did not deny FDIC's motion to intervene but rather dismissed it as moot after finding that the Court lacked subject matter jurisdiction. Accordingly, FDIC remains free to seek intervention in the state court, and therefore, suffers no prejudice in not having its motion to intervene heard by this Court.

In sum, the Court concludes that its January 5, 2000 order is non-reviewable on appeal. It follows then that this Court is completely divested of jurisdiction, and therefore, without power to issue a stay. Accordingly;

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[2] The Court notes that the procedural posture of the case at this time is virtually identical to the procedural posture of the case when Monogram sought to appeal the last remand order. Under that virtually identical procedural posture, the Fifth Circuit held that the remand order was not appealable. *Heaton,* 231 F.3d at 1000.

IT IS ORDERED that FDIC's motion for a stay should be and is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30104

PATRICIA HEATON

Plaintiff-Appellee

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

Defendant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Movant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

(Filed Mar. 22, 2001)

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that movant-appellant's motion for stay pending appeal is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30104

PATRICIA HEATON

Plaintiff-Appellee

v.

MONOGRAM CREDIT CARD BANK OF GEORGIA

Defendant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Movant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

Before EMILIO M. GARZA, STEWART, and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellee's motion to dismiss appeal for lack of jurisdiction is carried with the case.

Judge Stewart dissents and would GRANT the motion to dismiss the FDIC's appeal for lack of jurisdiction.

/s/ CES

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 98-8275 SECTION "16"

DIVISION "D"

PATRICIA HEATON, Individually and on behalf of herself and all others similarly situated,

VERSUS

MONOGRAM CREDIT CARD BANK OF GEORGIA

FILED: _____ _____
DEPUTY CLERK

MOTION FOR LEAVE TO FILE PETITION IN INTERVENTION

NOW INTO COURT, through undersigned counsel, comes the Federal Deposit Insurance Corporation ("FDIC" or "Petitioner in Intervention"), who pursuant to Articles 1031 and 1033 of the Louisiana Code of Civil Procedure, moves this Court for leave to file the attached Petition in Intervention. For the reasons set forth in the FDIC's accompanying Memorandum in Support of its motion for leave to file Petition in Intervention, Petitioner in Intervention avers that the intervention is proper and

that the filing of this petition will not retard the progress of the principal action.

Respectfully submitted,

/s/ James A. Brown
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Attorneys for Federal Deposit Insurance Corporation, Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been served upon counsel of record by hand delivery this 3d day of April, 2001.

/s/ James A. Brown
James A. Brown

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

PATRICIA HEATON, Individually and on behalf of herself and all others similarly situated Plaintiff VERSUS MONOGRAM CREDIT CARD BANK OF GEORGIA Defendant	*	DOCKET NO. 98-1823-J c/w 99-2603-J New Orleans, Louisiana November 10, 1999 9:30 A.M.

THE FOLLOWING IS A TRANSCRIPT OF MOTIONS HEARD BEFORE THE HONORABLE CARL BARBIER, PRESIDING JUDGE ON THE 10th DAY OF NOVEMBER, 1999.

APPEARANCES:

FOR THE PLAINTIFF:	GERTLER, GERTLER, VINCENT & PLOTKIN (BY: LOUIS L. PLOTKIN) 127-129 Carondelet St. New Orleans, LA 70130
FOR THE DEFENDANT	McGLINCHEY, STAFFORD A Professional Limited Liability Company (BY: ANTHONY ROLLO) 643 Magazine Street P. O. Box 60643 New Orleans, LA 70130-3477 BALLARD, SPAHR, ANDREWS & INGERSOLL, LLP (BY: BURT M. RUBLIN) 1735 Market Street 51st Floor Philadelphia, PA 19103-7599

* * *

[33] illegal or wrong, but it seems to me the sole reason for them insuring this minute fraction of their deposits is to get qualified as a state bank under the statute. I want you to tell me if I am wrong.

MR. RUBLIN: Your Honor, that's the most insurance they can get. They can get a hundred thousand dollars per deposit.

THE COURT: You haven't answered my question. Is there any other reason for them to carry this insurance?

MR. RUBLIN: It is part of being a state bank. They want to be a state bank.

THE COURT: That's the sole reason for it, really.

MR. RUBLIN: Yes. There is nothing improper about that.

THE COURT: I never said there was. Why didn't you say that when I asked you five minutes ago instead of beating around the bush with it?

MR. RUBLIN: Well, Your Honor, it is integral to their function as a state bank, as a credit card bank, that they be insured as a depository institution by the FDIC. That comes with regulation by the FDIC. That comes with periodic examinations by the FDIC. There are hundreds of credit card banks, Your Honor, around the country. Monogram is one of many hundreds of credit card banks. This

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